



NO JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBIN G. BRODIE,)	Case No. CV 12-07690 DDP (AGRx)
)	
Plaintiff,)	ORDER GRANTING DEFENDANT CSU'S
)	MOTION TO DISMISS PLAINTIFF'S
v.)	FIRST AMENDED COMPLAINT
)	
BOARD OF TRUSTEES OF THE)	[Dkt. No. 32]
CALIFORNIA STATE UNIVERSITY)	
(California Polytechnic)	
State University San Luis)	
Obispo, Performing Arts)	
Center San Luis Obispo, a)	
Cal Poly facility), TERRI)	
HOPSON,)	
)	
Defendants.)	
)	
)	

Presently before the Court is Defendant California State University's ("CSU") Motion to Dismiss Plaintiff's First Amended Complaint (the "Motion"). For the reasons stated in this order, the Motion is GRANTED.

I. Background

The underlying facts giving rise to this action are set forth more fully in the Court's prior order dismissing the original complaint without prejudice. (See Docket No. 18.) The Court recites

1 here only those facts that are important to resolution of the
2 instant motion.

3 Plaintiff Robin G. Brodie ("Plaintiff") brings this action
4 against Defendants Board of Trustees of California State University
5 ("CSU"), Plaintiff's employer, and Terri Hopson ("Hopson"), a CSU
6 employee, alleging sexual harassment and sex discrimination against
7 CSU under Title VII and sexual harassment and discrimination
8 against Hopson under 42 U.S.C. § 1983. (First Amended Complaint
9 ("FAC"), at 6-7.) Plaintiff's Title VII cause of action against CSU
10 in her original complaint was dismissed without prejudice for
11 failure to exhaust administrative remedies prior to filing the
12 action. (Docket No. 18.) Plaintiff has now filed her First Amended
13 Complaint. (Docket No. 30.)

14 The last alleged act of sexual harassment of Plaintiff by
15 Hopson took place on September 8, 2010. (FAC ¶ 35.) At some
16 unspecified point, Plaintiff reported the harassment to the Human
17 Resources Department at CSU, who conducted an investigation into
18 the matter. (Id. ¶¶ 30-34.) Plaintiff alleges that she was told by
19 Human Resources that the issue was completely confidential and that
20 she should not talk to anyone about her complaints. (Id. ¶¶ 34,
21 44.) On an unspecified date in 2011, Plaintiff learned that her
22 allegations against Hopson were found by CSU to be true. (Id. ¶
23 42.)

24 Though not included in Plaintiff's FAC, it is undisputed that
25 Plaintiff met with an attorney, "Attorney K," sometime in late 2011
26 to discuss her case. (Opp. to Motion, Docket No. 33, at 1-2.)
27 Plaintiff stated the following facts in her opposition to the prior
28 motion to dismiss regarding her interaction with Attorney K:

1 Near the end of 2011, Plaintiff went to see an attorney,
2 who will be referred to as "Attorney K." Attorney K told
3 her she would have to file something within two years.
4 Attorney K mentioned that he would file something with
5 FEHA. Plaintiff did not know what this was and it was
6 not explained. At some later point Attorney K told the
7 Plaintiff that he had missed the deadline for filing
8 with FEHA. He advised her to try to file a late claim by
9 herself, and to contact an attorney at FEHA to seek an
10 exception to the time limits. He suggested that she tell
11 the attorney at FEHA that Attorney K was at fault, but
12 he refused to write a letter stating so. The attorney
13 she spoke with at FEHA told her that Attorney K was
14 supposed to fill out the complaint form. (It is not
15 clear that Attorney K completely understands the process
16 himself.)

17 (Docket No. 15, at 3-4.) Plaintiff also stated that "Attorney K
18 mentioned FEHA without any further explanation" and that "she had
19 no idea she was supposed to file ... a complaint [with DFEH or
20 EEOC]." (Id. at 7-8.)

21 Plaintiff then contacted her current attorney in late August
22 2012, who assisted her in filing her original complaint in this
23 action on September 7, 2012. (Docket No. 1.) Plaintiff's original
24 complaint was dismissed against CSU without prejudice on December
25 11, 2012 for, among other reasons, failure to exhaust
26 administrative remedies. (Docket No. 18.) Plaintiff then filed an
27 admittedly late EEOC discrimination charge on January 18, 2013.

(Opp. to Motion, Docket No. 33, at 3.) That claim was denied on May 8, 2013, and Plaintiff received a Notice of Right to Sue. (Id.)

CSU now seeks to again dismiss Plaintiff's Title VII discrimination claim on the basis that she failed to timely exhaust her administrative remedies.¹ Plaintiff argues that equitable tolling and equitable estoppel should excuse her late EEOC filing because she did not have notice that she needed to file an administrative complaint and because CSU told her to keep the issue confidential.

II. Legal Standard

"In order to bring a Title VII claim in district court, a plaintiff must first exhaust her administrative remedies." Sommatino v. United States, 255 F.3d 704, 708 (9th Cir. 2001) (citing 42 U.S.C. § 2000e-16(c)). Although failure to file a "timely EEOC administrative complaint with the EEOC is not a jurisdictional prerequisite," the Ninth Circuit has held "that substantial compliance with the presentment of discrimination complaints to an appropriate administrative agency is a jurisdictional prerequisite." Id. at 708 (citing Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982)).

However, the exhaustion requirement "is subject to waiver, estoppel, and equitable tolling." Zipes, 455 U.S. at 393. Late

¹CSU actually frames their argument around judicial estoppel, arguing that Plaintiff's representations to this Court about her meeting with Attorney K should serve to estop Plaintiff from now arguing that she was ignorant of her legal obligations. However, the Court interprets CSU's underlying argument as failure to timely exhaust. The Court notes that Plaintiff cannot now take a position that is clearly inconsistent with her earlier allegations, and the Court's analysis as to whether equitable tolling and/or equitable estoppel is appropriate will take facts pled in Plaintiff's earlier papers into account.

1 filing of an EEOC complaint "may be excused if the plaintiff had
2 neither official notice nor actual knowledge of the filing period."
3 Thornhill v. Marsh, 866 F.2d 1182, 1184-85 (9th Cir. 1989); see
4 also Cooper v. Bell, 628 F.2d 1208, 1211-14 (9th Cir. 1980).

5 **III. Discussion**

6 A. CSU's Judicial Estoppel Argument

7 CSU argues that Plaintiff should be judicially estopped from
8 arguing that she did not have notice of the exhaustion requirements
9 in support of her argument that the deadline for filing her EEOC
10 complaint should be equitably tolled. CSU argues that Plaintiff's
11 statements regarding her meeting with Attorney K in late 2011
12 contradict her claim that she did not have notice of the EEOC
13 filing requirements prior to her meeting with her current attorney
14 in August 2012.

15 Courts consider three main factors in determining whether
16 judicial estoppel can bar a litigant's position: (1) the party's
17 position must be "clearly inconsistent" with its earlier position;
18 (2) whether the party was successful in persuading the earlier
19 court to accept its position; and (3) whether the party seeking to
20 assert inconsistent positions would gain an unfair advantage if not
21 estopped. New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001).

22 CSU argues that Plaintiff's claims regarding her meeting with
23 Attorney K in 2011 are clearly inconsistent with her allegations
24 that CSU intentionally misled her into believing that she did not
25 have to file a complaint. (Motion, Docket No. 32-1, at 6-7.) CSU
26 further argues that the facts pled regarding the meeting with
27 Attorney K are clearly inconsistent with Plaintiff's contention
28

1 that she was unaware of her need to file an EEOC or DFEH complaint.
2 (Id. at 7.)

3 The Court finds that the two positions are not "clearly
4 inconsistent." As Plaintiff explains in her opposition to the
5 Motion, her allegations regarding her meeting with Attorney K
6 reflect that she emerged from that meeting with information that
7 was incomplete and inaccurate regarding her obligation to file a
8 claim with either DFEH or the EEOC. Therefore, Plaintiff's claim
9 that she was not fully aware of the need to file an administrative
10 complaint until she met with her current attorney is not
11 inconsistent with the facts she alleged regarding her meeting with
12 Attorney K. Furthermore, Plaintiff did not use the facts regarding
13 her interactions with Attorney K to try to previously argue that
14 she *did* have notice; in fact, she used them to try to argue that
15 any notice she might have had was insufficient. As a result, the
16 Court finds that the doctrine of judicial estoppel does not bar
17 Plaintiff's argument that the deadline for filing an administrative
18 complaint should be equitably tolled for lack of notice.²

19 B. Plaintiff's Request for Equitable Tolling

20 "The doctrine of equitable tolling focuses on a plaintiff's
21 excusable ignorance and lack of prejudice to the defendant." Leong
22 v. Potter, 347 F.3d 1117, 1123 (9th Cir. 2003). A plaintiff is
23 entitled to equitable tolling only if she shows (1) that she has
24 been pursuing her rights diligently, and (2) that some

25
26 ²The Court's analysis in this section is limited to whether
27 the positions are "clearly inconsistent," and thus whether
28 Plaintiff is precluded from even *arguing* that she is entitled to
equitable tolling. The Court's analysis as to whether the meeting
with Attorney K provided Plaintiff with sufficient notice to defeat
a claim of equitable tolling is addressed separately.

1 extraordinary circumstance prevented timely filing. Pace v.
2 DiGuglielmo, 544 U.S. 408, 418 (2005). "This doctrine has been
3 consistently applied to excuse a claimant's failure to comply with
4 the time limitations where she had neither actual nor constructive
5 notice of the filing period." Leorna v. U.S. Dept. of State, 105
6 F.3d 548, 551 (9th Cir. 1997). "However, once a claimant retains
7 counsel, tolling ceases because she has 'gained the means of
8 knowledge of her rights and can be charged with constructive
9 knowledge of the law's requirements.'" Id. (quoting Stallcop v.
10 Kaiser Foundation Hospitals, 820 F.2d 1044, 1050 (9th Cir. 1987)).

11 Plaintiff is clearly entitled to equitable tolling for the
12 period prior to her consultation with Attorney K, as she alleges
13 that she was not on notice that she was required to file an
14 administrative complaint and CSU does not dispute this. (Reply to
15 Mtn., Docket No. 34, at 4.) Plaintiff alleges that she was told by
16 CSU not to discuss her case with anyone while they investigated her
17 complaint. She also contends that CSU never informed her of her
18 rights and obligations in filing an EEOC complaint. As a result,
19 Plaintiff is excused for any delay in filing prior to "late 2011"
20 when she met with Attorney K.

21 The closer question is whether Plaintiff is entitled to
22 further tolling for the period between late 2011, when Plaintiff
23 met with Attorney K, and January 18, 2013, when Plaintiff filed her
24 EEOC complaint. Plaintiff admits that her EEOC complaint was filed
25 well after the 180-day deadline for timely filing. (Opp. to Mtn.,
26 Docket No. 33, at 4-5.) However, Plaintiff argues that the time for
27 filing with the EEOC should be tolled because she did not have
28 notice of the filing period until she retained her current attorney

1 because Attorney K did not give her enough correct information for
2 her to be on notice of the administrative filing requirements.

3 Plaintiff has not demonstrated that she was diligent in
4 pursuing her rights to such an extent that she should be afforded
5 the "extraordinary remedy" of equitable tolling. Despite the
6 shortcomings of Attorney K's advice in Plaintiff's initial
7 consultation and subsequent follow-up, Plaintiff was, at a minimum,
8 on notice that she needed to file *something* with *some* agency in
9 order to preserve her rights, which would prompt a reasonably
10 diligent litigant to further investigate.³ Further, Attorney K
11 later told Plaintiff that she had missed the filing deadline, and
12 Plaintiff herself contacted "FEHA" (presumably meaning DFEH) to
13 figure out what she was supposed to do in order to pursue a late
14 claim. These facts indicate that Plaintiff knew, at the latest by
15 the date on which Plaintiff contacted DFEH to find out about filing
16 a late complaint, that she needed to file something in order to
17 preserve her rights. Further, any allegation of mere negligence on
18 the part of Attorney K for not properly filing a DFEH complaint is
19 not a sufficient basis for equitable tolling. Porter v. Ollison,

22 ³The Court agrees with Plaintiff that the mere fact of
23 consultation with an attorney, without more, may not be sufficient
24 to impute notice in all circumstances. See, e.g., Thornhill v.
25 Marsh, 866 F.2d 1182, 1184-85 (9th Cir. 1989) ("The circumstance
26 that Thornhill consulted an attorney may be relevant evidence, but
27 it is hardly conclusive."). For example, if Attorney K had told
28 Plaintiff that there was no statute of limitations for her claims,
the Court might be more inclined to agree that Plaintiff was not on
any sort of notice. However, the facts Plaintiff alleged regarding
her meeting with Attorney K demonstrate that she received
information that would have prompted a diligent litigant to
investigate further, putting her on notice that she might lose the
right to file her claims if she delayed too long.

1 620 F.3d 952, 959 (9th Cir. 2010); Mendoza v. Lehigh Southwest
2 Cement Co., 2012 WL 1534754, at *7 (N.D. Cal. 2012).

3 The exact dates on which the events involving Attorney K
4 occurred are unclear. However, Plaintiff has not alleged sufficient
5 facts to demonstrate that she was not on notice regarding her need
6 to file an administrative complaint as of July 18, 2012, 180 days
7 before Plaintiff filed her EEOC complaint. Nor is it clear that she
8 diligently pursued her rights following her interactions with
9 Attorney K and her inquiry directed at DFEH. Therefore, the Court
10 finds that Plaintiff has not demonstrated that equitable tolling is
11 proper under the circumstances.

12 C. Plaintiff's Request for Equitable Estoppel

13 Equitable estoppel focuses primarily on a defendant's wrongful
14 conduct in preventing a plaintiff from filing a complaint within
15 the statute of limitations. O'Donnell v. Vencor Inc., 466 F.3d
16 1104, 1111 (9th Cir. 2006). Factors that courts consider when
17 determining whether equitable estoppel is appropriate include: "(1)
18 the plaintiff's actual and reasonable reliance on the defendant's
19 conduct or representations, (2) evidence of improper purpose on the
20 part of the defendant, or of the defendant's actual or constructive
21 knowledge of the deceptive nature of its conduct, and (3) the
22 extent to which the purposes of the limitations period have been
23 satisfied." Santa Maria v. Pacific Bell, 202 F.3d 1170, 1176 (9th
24 Cir. 2000) (rev'd on other grounds).

25 Plaintiff argues that CSU should be equitably estopped from
26 arguing that she was required to exhaust her administrative
27 remedies because CSU allegedly told Plaintiff that she needed to
28 keep the issue confidential, preventing her from discussing the

1 issue with an attorney or finding out that she needed to file an
2 administrative complaint. Plaintiff alleges in the FAC that she was
3 advised as late as March 9, 2011 of the need to maintain
4 confidentiality. (FAC ¶ 44.)

5 Considering the relevant factors for equitable estoppel, the
6 Court is not convinced that it is appropriate here for the time
7 period between the end of 2011 and January 2013. First, Plaintiff
8 plainly did not continue to rely indefinitely on CSU's admonitions
9 that she maintain confidentiality, as she consulted Attorney K near
10 the end of 2011. Once she consulted Attorney K and learned that she
11 might need to file something within a time limit, she can no longer
12 claim to have reasonably relied on CSU's requests for
13 confidentiality and that this was the reason why she did not timely
14 file within the 180-day period following her meeting with Attorney
15 K. Once Plaintiff stopped adhering to CSU's request for her to
16 maintain confidentiality and met with Attorney K, she cannot
17 contend that CSU should be estopped from ever asserting a statute
18 of limitations defense, no matter how long she waited to file. See
19 Vera v. McHugh, 622 F.3d 17, 30 (1st Cir. 2010) ("[S]ome courts
20 have held that to invoke an estoppel as a shield against a statute
21 of limitations defense, a plaintiff must show that she brought her
22 action within a reasonable time after the facts giving rise to the
23 estoppel have ceased to be operational." (internal quotation marks
24 omitted)); Buttry v. Gen. Signal Corp., 68 F.3d 1488, 1494 (2d Cir.
25 1995).

26 It is also far from clear that CSU had an improper purpose in
27 asking Plaintiff to maintain confidentiality. At the time, CSU was
28 conducting internal investigations into the allegations and may

1 have intended only to dissuade Plaintiff from discussing the facts
2 of the case or the investigation process with others in the
3 workplace.⁴ Plaintiff makes no allegation that CSU was purposely
4 trying to prevent her from filing her administrative complaint.
5 While CSU should have known that its insistence on confidentiality
6 might dissuade Plaintiff from pursuing her claims, CSU did not
7 actually succeed in convincing Plaintiff not to discuss her claims
8 with anyone. Therefore, the Court finds that Plaintiff has not
9 demonstrated that equitable estoppel is appropriate in this case.

10 **IV. Conclusion**

11 For the foregoing reasons, the Court GRANTS the Motion WITHOUT
12 PREJUDICE. The Court allows Plaintiff leave to amend her complaint
13 to allege additional facts that demonstrate that she is entitled to
14 equitable tolling and/or equitable estoppel, in accordance with the
15 Court's views as expressed in this order. Any amended complaint
16 shall be filed by February 18, 2014.

17
18 IT IS SO ORDERED.

19
20 Dated: February 3, 2014


DEAN D. PREGERSON
United States District Judge

23 ⁴Plaintiff also appears to argue that CSU should be estopped
24 because CSU failed in its affirmative duty to inform her of her
25 right to file an EEOC complaint. (Opp. to Mtn., Docket No. 33, at
26 5.) However, contrary to Plaintiff's assertions, CSU is under no
27 affirmative obligation to inform Plaintiff of the administrative
28 claims process. See Lehman v. U.S., 154 F.3d 1010, 1017 (9th Cir.
1998) ("[A]n omission to give advice is insufficient conduct to
support equitable estoppel against the government.") The provision
on which Plaintiff relies, 29 C.F.R. § 1604.11(f), details what an
employer "should" do according to best practices, not what an
employer "must" do.